

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, ET AL.  
PLAINTIFFS

V.

JEFFREY DERDERIAN, ET AL.  
DEFENDANTS

C.A. NO. 04-312L

**PLAINTIFFS' SUR-REPLY MEMO**

The purpose of this memo is to briefly address the following matters:

1. Defendants' continuous, circuitous travel outside the confines of the Plaintiffs' Complaint even though Defendants are pursuing a motion to dismiss for failure to state a claim upon which relief can be granted and have never requested conversion to a motion for summary judgment;
2. Plaintiffs' satisfaction of the pleading requirements set forth in Fed.R.Civ.P. 8(a); and
3. The very direct, focused, additional factual allegations set forth in Plaintiffs' proposed Amended Complaint.

**DEFENDANTS' CIRCUITOUS TRAVEL and ARGUMENT**

Defendants' motions have been filed under Fed.R.Civ.P. 12(b)(6)<sup>1</sup>. Despite this fact, Defendants have engaged in widespread, continuous departures from the facts alleged in those counts in the Plaintiffs' Complaint which are directed against them<sup>2</sup>. Defendants continuously refer to assertions of

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<sup>1</sup>Defendants General Foam and Foamex each include in their memorandum in support of their respective Rule 12(b)(6) Motion To Dismiss an identical sentence that asks "in the alternative...for summary judgment on the basis that there are no issues of material facts and they is (sic) entitled to judgment as a matter of law." General Foam et als memorandum at P. 2; Foamex et als memorandum at p. 3. Despite this language, Defendants have never actually requested conversion of their 12(b)(6) motions to summary judgment motions. They also have never satisfied Local Rule 12.1(a)(1) governing motions for summary judgment.

<sup>2</sup>Leggett & Platt – Counts XLIII (negligence), XLIV (strict liability). In Plaintiffs' First Amended Master Complaint, these Counts are numbered - Counts LI (negligence), LII (strict liability), LIII (breach of warranty).  
L & P Financial Services Co. - Counts XLV (negligence), XLVI (strict liability). In Plaintiffs' First Amended Master Complaint, these Counts are numbered - Counts LIV (negligence), LV (strict liability), LVI (breach of warranty).  
General Foam Corporation - Counts XLVII (negligence), XLVIII (strict liability). In Plaintiffs' First Amended Master Complaint, these Counts are numbered - Counts LVII (negligence), LVIII (strict liability), LIX (breach of warranty).  
GFC Foam, LLC - Counts XLIX (negligence), L (strict liability). In Plaintiffs' First Amended Master Complaint, these Counts are numbered - Counts LX (negligence), LXI (strict liability), LXII (breach of warranty).  
Foamex LP - Count LI (successor liability). In Plaintiffs' First Amended Master Complaint, this Count is numbered - Count LXIII (successor liability).

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fact which are set forth in extraneous documents such as affidavits by in-house employees and experts and even in a corporate marketing brochure. Defendants claim as fact many allegations that are clearly beyond the well-pled facts in Plaintiffs' Complaint. They seek to derive all of the benefits of a summary judgment motion in the context of a 12(b)(6) motion to dismiss.

The instances of Defendants' travel beyond Counts XLIII - LVI are so numerous that they cannot all be listed here. A few representative examples of the Defendants' claimed facts which are clearly outside Counts XLIII - LVI follow below:

1. The alleged warnings claimed to have been given by Defendants;
2. The alleged safe uses of untreated polyurethane foam;
3. The alleged remanufacture of Defendants' foam by Defendant American Foam Corporation;
4. Defendants' alleged status as bulk suppliers of an alleged non-defective, component part;
5. The alleged misuse of Defendants' foam product by other individuals;
6. The alleged use of Defendants' foam for a purpose other than that for which it was intended;
7. The alleged subsequent alteration of Defendants' foam by others;
8. The alleged wrongful conduct of alleged supervening actors.

There are many other instances where Defendants attempt to weave facts extraneous to the pleadings into their argument and their 12(b)(6) proof. These defense efforts can be readily discerned by review of Defendants' memorandum and affidavits and will be more fully addressed at oral argument on these motions.

Although there is ample evidence to support all of the facts alleged in Counts XLIII - LVI, they do not need to be proved at this juncture – only pled. The issue presently before the court is not what

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Foamex International, Inc. - Counts LII (negligence), LIII (strict liability). In Plaintiffs' First Amended Master Complaint, this Count is numbered - Count LXIV (liability for Foamex LP).

FMXI, Inc. - Count LIV (liability as general partner). In Plaintiffs' First Amended Master Complaint, this Count is numbered - Count LXV (liability as general partner).

PMC, Inc. - Count LV (parent company liability). In Plaintiffs' First Amended Master Complaint, this Count is numbered - Count LXVI (parent company liability).

PMC Global, Inc. - Count LVI (liability of PMC, Inc.). In Plaintiffs' First Amended Master Complaint, this Count is numbered - Count LXVII (liability of PMC, Inc.).

Plaintiffs are required ultimately to prove in order to prevail on their claims but, rather, what they are required to plead in order to be permitted to develop their case for eventual adjudication.

**PLAINTIFFS' COMPLAINT AND AMENDED COMPLAINT**  
**STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED**

A 12(b)(6) motion should be granted only if it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See Rhode Island Brotherhood of Correctional Officers v. State of Rhode Island et als, 264 F. Supp. 2d 87, at p. 92 (2003); Greene v. State of Rhode Island, 289 F. Supp. 2d 5 (D.R.I. 2003) (citing Roma Const. Co. v. aRusso, 96 F.3d 566, 569 (1<sup>st</sup> Cir. 1996) (“A court should not grant a motion to dismiss pursuant to Rule 12(b)(6) unless it appears to a certainty that plaintiff would be unable to recover under any set of facts.”) (underline added). Dismissal is only proper when it is clear that even if all the facts in the Complaint are true, Plaintiff cannot recover on any viable legal theory. The scrutiny required of Plaintiffs’ pleadings in the context of a 12(b)(6) motion is less demanding than that for a motion for summary judgment. See Beddall v. State Street Bank & Trust Co., 137 F.3d12 (1<sup>st</sup> Cir. 1998).

Plaintiffs are not required to plead facts supporting each and every element of each prima facie case in each Count. Plaintiffs need only plead enough facts to give Defendant fair notice of what the claim is and the grounds upon which it rests. See Swierkiewicz v. Sorema N.A., 534U.S.506 (2002). Plaintiffs’ original Complaint satisfies the notice pleading requirements of Rule 8(a). Defendants are clearly apprised of each claim against them in each count.<sup>3</sup>

**PLAINTIFFS' AMENDED COMPLAINT**

Out of an abundance of caution, Plaintiffs have filed a motion for leave to file an Amended Complaint along with a proposed Amended Complaint which adds detailed factual allegations in Counts LI - LXVII. The foam manufacturers and their related companies are central in importance to this

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<sup>3</sup>Other than the mistaken labeling of Counts LII and LIII against Foamex International, Inc. which clearly is being sued as a successor in interest and not as the actual manufacturer of the foam in question, each count in Plaintiffs’ original Complaint accurately and concisely sets forth the short and plain statement of Plaintiffs’ claims that is required by Rule 8(a). The claims against Foamex International, Inc. in Plaintiffs’ First Amended Master Complaint, based on successor liability, are found in Count LXIV.

litigation. Without their product, no fire would have started, have spread so fast or killed and injured so many people. The additional detail in Counts LI - LXVII reflects a cautious approach to pleading by Plaintiffs and recognizes the critical importance of these Defendants to this litigation.

Counts LI - LXVII are pled alternatively to all of the other counts filed against non-foam manufacturers. The allegations in Paragraphs LI - LXVII are separate and apart from the allegations in the counts against other Defendants. No other counts are incorporated into these counts. Each of these counts specifically alleges and/or incorporates precise factual allegations sufficient to establish a prima facie case against these Defendants as to each count. See United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 467 (1957) (alternative pleading expressly permitted under Fed. R. Civ. P. 8(e)(2)).

As the first Circuit Court of Appeals has noted in Rodriguez-Suris et al v. Montesinos et al:

This argument fails adequately to take into account a procedural provision, in Federal Rule of Civil Procedure 8(e)(2), that allows parties to take inconsistent positions in their pleadings. Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading. See Gens v. Resolution Trust Corp., 112 F.3d 569, 573 & n. 4 (1<sup>st</sup> Cir.1997) (noting the relaxed standard of the Federal Rules that allows alternative pleadings); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555 (1<sup>st</sup> Cir. 1994) ("Because procedural law allows alternative contentions, parties to a civil action involving such an array of factual and legal theories as this case presents may be allowed to defer choice at least until late stages of proceedings in the trial court."); McCalden v. California Library Ass'n, 955 F.2d 1214 (9<sup>th</sup> Cir. 1990) (holding that allegations should not be construed as an admission against inconsistent claims), cert. denied, 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 227 (1992); Molsbergen v. United States, 757 F.2d 1016, 1018-19 (9<sup>th</sup> Cir.) (same), cert dismissed, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed. 2d 706 (1985).

123 F.3d 10, at p. 21.

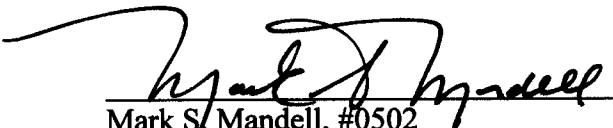
Rule 8(e)(2) permits inconsistency in both legal and factual allegations. See Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165 (3<sup>rd</sup> Cir. 1997). It has been interpreted to mean that a court "may not construe a plaintiff's first claim as an admission against another alternative or inconsistent claim". Henry v. Daytop Village, 42 F.3d 89, 95 (2d Cir. 1994).

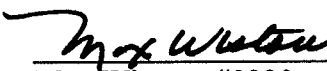
In an effort not to reiterate these additional, specific factual allegations here, Plaintiffs request that the court review and accept as true all of the well-pled factual allegations set forth in Counts LI - LXVII of Plaintiffs' First Amended Master Complaint in deciding these motions. Alternatively, Plaintiffs request that the hearing on these motions be postponed until Plaintiffs' motion for leave to file their First Amended Master Complaint has been resolved. Although Plaintiffs' motion for leave to file their First Amended Master Complaint has not yet been granted, said motion and proposed Amended Complaint have been filed with the court.

An order granting a 12(b)(6) motion does not constitute a judgment on the merits. This court's consideration of the factual allegations in Counts LVI - LXVII of Plaintiffs' Amended Complaint in deciding these motions would preclude the need to reargue these same motions after Plaintiffs' motion to amend has been decided. See Foman v. Davis, 371 U.S. 178, 182 (1962); Glassman v. Computervision Corp., 90 F.3d 617, 623 (1<sup>st</sup> Cir. 1996); Health Cost Controls v. Skinner, 44 F.3d 535, 538 (7<sup>th</sup> Cir. 1994).

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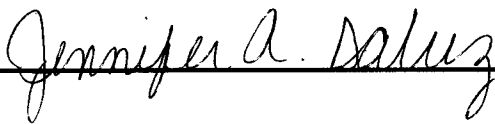
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A handwritten signature in cursive script, reading "Jennifer A. Daluz", is written over a solid horizontal line.